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Supreme Court of the United States

OCTOBER TERM—1948

JOHN KIVO, LEAH KIVO, and MILTON GARFUNKEL, individually and as partners doing business under the firm name and style of JOHN KIVO & CO.,

Petitioners,

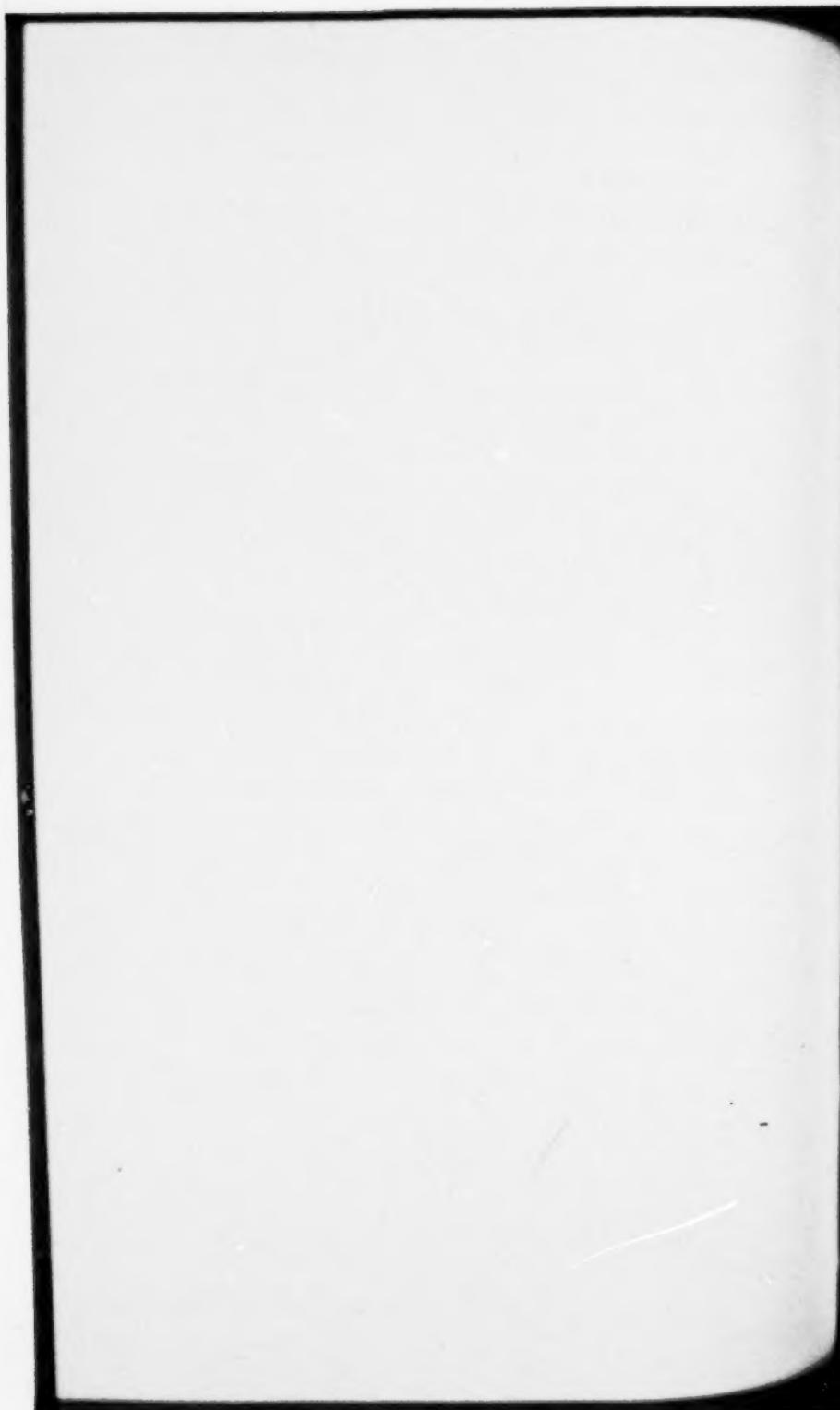
against

FRED LOEB,

Respondent.

**PETITION FOR WRIT OF CERTIORARI AND
BRIEF IN SUPPORT THEREOF**

✓ ALLAN R. CAMPBELL,
of SCRIBNER & MILLER,
Attorneys for Petitioners,
40 Wall Street,
New York, New York.



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Supreme Court of the United States

OCTOBER TERM—1948

JOHN KIVO, LEAH KIVO, and MILTON GARFUNKEL, individually and as partners doing business under the firm name and style of JOHN KIVO & CO.,

Petitioners,

against

FRED LOEB,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, John Kivo, Leah Kivo, and Milton Garfunkel, individually and as partners doing business under the firm name and style of John Kivo & Co., respectfully pray that a writ of certiorari issue under section 240(a) of the Judicial Code—U. S. C., Title 28, Section 347(a)—to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, dated August 4, 1948.

A certified transcript of the record in the case, including the proceedings in the Court of Appeals, has been furnished in accordance with Rule 38, Paragraph 1 of the rules of this court.

Opinions

The opinion of the District Court directing judgment for the plaintiff after trial is included at page 289 of the record and is printed in 77 F. Supp. 523. The opinion of the Court of Appeals for affirmance is at page 308 of the record, and the dissenting opinion of Judge Swan of that court is at page 316. It is printed in 169 F. 2d 346.

Jurisdiction

The jurisdiction of this court is invoked under section 240(a) of the Judicial Code, U. S. C., Title 28, Section 347(a).

Statute Involved

The statute is Section 8 of the Selective Training and Service Act of 1940 as amended (U. S. C., Tit. 50, Sec. 308) providing for reemployment of a returning veteran by his former employer, and particularly the part which we italicize in subsection (e) of that section, reading:

“(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the *district court* of the United States for the district in which such private employer maintains a place of business *shall have power*, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, *to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefit suffered by reason of such employer's unlawful action.* The court shall order a speedy hearing in any such case and shall advance it on the calendar.”

The Matter Involved

The matter involved is the power of the district court, under the above subsection, to award damages as an alternative to the specific relief of reinstatement. The defendants contend that the power to award a money judgment is limited to back pay as an incident to the right to reinstatement. Such was the declared purpose of the words beginning with "and as an incident thereto" when they were offered as an amendment to the bill, when pending in Congress.

In the Senate (Congressional Record, Volume 86, 76th Congress, 3rd session, p. 11, 030):

"Mr. Wagner:

"All that this amendment does is a simple act of justice, and I am sure it is an inadvertence that it has not been hitherto provided for.

"We now provide under the bill, in the case of one who has served under the draft and has ended his service and seeks reemployment in his former position, that in the event the employer refuses to reemploy the individual he then may petition the court for reinstatement, and then the court of course must proceed by hearing and reach a determination. It may happen that a period of 1 or 2 or 3 months will elapse before the court enters its judgment. In the meantime, if the employee is found by the court to be entitled to return to his position, he has been out of employment for a period of 1 to 3 months, and no authority is given the court to give him judgment for back pay during that period. The amendment simply provides that in addition to entering judgment finding that the employer has violated the law and that the individual is entitled to reemployment, the court may also order that he shall receive

back pay for lost wages due to the violation of the law.

"That is all that the amendment does so far as this bill is concerned."

In the House (Same volume—p. 11, 703):

"Mr. Healey:

"Mr. Chairman, this amendment merely gives the courts, after a decision has been reached in favor of the applicant for relief from failure to reinstate, power to assess as damages the loss of wages suffered by such applicant from the time he applies for reinstatement up to the time that the court finds that such reinstatement is justified on the facts and circumstances of the case. * * * It seems to me it is a matter of simple justice that if on all the facts the court finds that it is not unreasonable or impossible to reinstate that man, and the private employer has refused and thereby violated the provisions of this section by such refusal, the court ought to have the power to reinstate the man and assess as damages the loss of wages he has suffered from the time he applied for reinstatement until the court renders a decision in his favor.

"Did you ever hear of a reinstatement ever being ordered by a tribunal of justice that did not also restore the wages that were lost or the damages that were suffered by the applicant who such body had determined ought to be reinstated and restored to his status quo?"

The judgment here sought to be reviewed is not for back pay as an incident to reinstatement or for back pay at all; but damages for a year, chosen by the plaintiff as an alternative to the specific relief of reinstatement for a year as provided by the Act.

Statement of the Case.

The plaintiff, returning from the army, applied for his former position as an outside salesman to solicit orders on commission. When told that a revolution in market conditions had made the position obsolete he accepted instead employment which he described as a reserve "in case the business would turn back to a buyer's market" (p. 32) and accordingly signed a contract for a year (Ex. 1), "to do selling and all duties that the firm requires in relation to the daily routine, at a compensation of \$100 per week",—a compensation substantially more than he had earned in commissions (pp. 49-50).

After working for three weeks under this contract, he quit because the work assigned to him did not give him enough contact with the customers who came in, nor permit him to go out at his discretion to call on the trade (pp. 38-39).

Through attorneys, he immediately reoffered his services to the defendants, insisting on his pre-army commission basis (Ex. 4). On refusal, he took employment with a competing concern, which paid him commissions mostly on sales to the defendants' old customers (Exs. B, E-1, E-2, E-3).

He became a partner in this competing concern on April 8, 1946. The partnership agreement (Ex. C) was expressed "to commence on the 8th day of April, 1946 and to continue until the 6th day of April, 1949 and from year to year thereafter." It required him to devote his "entire time to the business of the partnership". It also provided (p. 275):

"AND it is agreed by and between the parties to these presents, that at all times during the continuance of their co-partnership, they and each of them will give their attendance, and do their and each of their

best endeavors, and to the utmost of their skill and power, exert themselves for their joint interest, profit, benefit and advantage, and truly employ, buy, sell, and merchandise with their joint stock, and the increase thereof, in the business aforesaid."

Two days later he brought this suit alleging refusal to restore him to the employment to which he was entitled under the Act, and demanding judgment (p. 4)

"Requiring the employer to comply with such provisions, and as an incident thereto to compensate him for any loss of wages or benefits suffered by reason of the employer's unlawful action."

This demand followed the wording of the Act except that it omitted "specifically" before "comply". Specific relief would have meant giving up his partnership to which he had just bound himself for a year. At the time of the trial he was still in the partnership (p. 75) so his claim as then stated to the court was not for reinstatement as an employee of the defendants but for general damages for, "in effect, a breach of contract, a breach of the provisions of the G. I. Bill of Rights, to the sum of \$24,000" (p. 17). The district court excluded inquiry as to whether he was ready and willing to take reinstatement (p. 241)—which, of course, he was not,— and awarded a money judgment for a year's damages; the difference between \$13,465.92, the sum earned in 1946 by "the theoretical person whose position the Act gives to the plaintiff", and \$5,509.18, the plaintiff's earnings in 1946 in his partnership and elsewhere (pp. 295, 297).

In the Court of Appeals, the appellants contended:

First. Compromise and settlement: that the plaintiff was barred by the employment agreement he made with the defendants and started to perform.

SECOND. *Change of business conditions*: that the record showed no position to which the plaintiff was entitled to be restored, and that an inside position with managerial duties yielding over \$13,000 was not one of like status and pay to the plaintiff's former employment as an outside commission salesman yielding \$3,700.

THIRD. *Limited power of the court*: that the statutory provision for incidental damages does not give the veteran an option to abandon pursuit of the specific relief of restoration and recover damages instead.

The Court of Appeals decided all three of these points in the plaintiff's favor (pp. 308-16); Judge Swan dissenting on all three (pp. 316-19).

On the third point, we applied for a rehearing (p. 321) and submitted in support relevant parts of the Congressional Record (p. 329). Rehearing was denied (p. 335).

We submit that this third point presents a question of such importance as to call for consideration by this court.

Questions Presented

1. In an action under section 8 of the Selective Training and Service Act of 1940 is the power of the district court to grant relief limited to the relief provided in that Act?
2. Does that Act empower the district court to award a year's damages instead of the specific relief of a year's reemployment with back pay as an incident thereto?
3. Is the power of the court to award damages as an incident to reinstatement affected by the veteran's having voluntarily so committed himself to other occupation that he could not take reinstatement?

Special and Important Reasons for Granting the Writ

The question of federal law decided by the Court of Appeals has not been decided by this court. We find only three decisions of this court which refer to Section 8 of the Act: *Fishgold v. Sullivan Drydock & Repair Co.*, 328 U. S. 275, *Trailmobile Co. v. Whirls*, 331 U. S. 40, and *Hilton v. Sullivan*, 68 Sup. Ct. Rep. 1020. The first two of these involved only questions of seniority; the third, preference in government employment; none of them the question here presented.

It is important that the question should be decided by this court for the following reasons:

1. To reach its decision the Court of Appeals departed from rules established by applicable decisions of this court:

The rule that where a statute creates a new right and prescribes a remedy, the remedy prescribed is exclusive. (*Pollard v. Bailey*, 20 Wall. 520, 527; *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 365.)

The rule that in applying Section 8 of this Act (or any other statute) this court will not do violence to its grammatical and substantive structure (*Trailmobile Co. v. Whirls*, 331 U. S. 40, 55) especially when that would overrule congressional policy as expressly declared by the sponsors of the words used in explaining their purpose to Congress (*Hilton v. Sullivan*, 68 Sup. Ct. Rep. 1020).

The rule that a statute conferring a limited power on the court to award damages as an incident to mandatory relief will not be treated as a power to award damages where the case for mandatory relief for any reason fails (*LeCrone v. McAdoo*, 253 U. S. 217).

2. The question is one on which the decisions in the various circuits are in such confusion as to afford no dependable guide for pending or future cases.

Up to date, the decisions as to what money judgment may be awarded a veteran under the Act fall into two groups:

The "back pay" compensation group treats the Act as providing for *two consecutive periods*,—the period pending the suit, to be compensated by back pay, and thereafter the period of a year, for which employment is to be specifically decreed; and

The "year's damage" group, treats the Act as protecting the veteran for *a single period*,—the year from refusal of his demand for reemployment—and as giving him a free option to claim damages for that period instead of specific restoration.

On the first theory, the compensation period ends when the reemployment period begins, or the right to reemployment is waived or discarded by the plaintiff. On the second theory, the damage period runs for a full year and the damages take the place of reemployment.

The present case is, therefore, in the second group.

In our annexed brief we discuss decisions in the respective groups and present our reasons why those in the first group are in accordance with the statute and those in the second group are not (Brief, Points II and III).

We show there also that the theory of the second group of cases works to the disadvantage of the veteran who wants reinstatement and keeps trying to get it, and to the advantage only of the veteran who does not want reinstatement and would rather claim damages and spend the year in a new business enterprise, as in the present case, or remain idle for a year and not try for work at all, as in *Williams v. Dodds*, 163 F. 2d 724.

3. This question of the court's power under the 1940 Act remains and will remain a live one.

We are informed by the Office of Administration of the Courts, by letter dated September 17, 1948, that there are eighty-seven actions pending under Section 8. There are still hosts of soldiers, sailors and marines still in the service, who on discharge will have reemployment rights under the Act of 1940.

4. The corresponding provisions of the 1948 Act present a similar question, dependent on the answer to the question here.

The Selective Service Act of 1948 (Public Law 759—80th Congress, Chap. 625—2nd Session) is so phrased as to continue the confusion which a decision in this case will clear up. Its Section 9(d) reads the same as Section 8(e) of the 1940 Act down to the definition of the power of the court. The new Act says the court shall have power:

“specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: Provided, That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions.”

Explanations of this change in language appear in a report of the Senate Committee on Armed Services and in a letter by the Chief Clerk of the Senate Committee on Armed Services, a copy of which is appended at page 27 below.

In Point IV of our attached brief we discuss those explanations and the bearing of the change in wording upon the interpretation, first, of the 1940 Act, and then of the 1948 Act; reaching the conclusions that (1) the making of the change recognized that the power of the court to

award "damages" under the 1940 Act was limited to back pay compensation; and (2) the change made merely defined the limits of that power so as to permit a veteran entitled to back pay and entitled also to reinstatement, to waive the latter and recover back pay alone.

If this court, on review of the present judgment, should find our contentions correct as to the limits of the district court's power under the 1940 Act, the decision will result in clearing away the confusion and conflicts of view which have developed as to the 1940 Act and threaten to continue in the application of the 1948 Act.

Conclusion

For the above reasons, it is respectfully submitted that certiorari should be granted, directed to the United States Court of Appeals for the Second Circuit to review the judgment of that court dated August 4, 1948.

Dated, October 28, 1948.

**ALLAN R. CAMPBELL,
of SCRIBNER & MILLER,
Attorneys for Petitioners,
40 Wall Street,
New York, New York.**

BRIEF IN SUPPORT OF PETITION

The essential facts have been stated at pages 5-6 above.

Analysis

The judgment here is for damages for breach of a statutory duty,—to restore the plaintiff to his former position for a year. The damages were claimed as if for breach of contract for a year's employment (p. 17), and have been computed on that basis (p. 297).

But the only relief which the Act provides for such a case is:

*“The district court * * * shall have power * * * to specifically require such employer to comply with such provisions and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action.”*

The words we italicize came in as an amendment in the legislative course of the bill. Their declared purpose was solely to authorize an award of back pay as an incident to the specific relief of reinstatement. The sponsors of the amendment so stated:

Senator Wagner:

“It may happen that a period of 1 or 2 or 3 months will elapse before the court enters its judgment. In the meantime, if the employee is found by the court to be entitled to return to his position, he has been out of employment for a period of 1 to 3 months, and no authority is given the court to give him judgment for back pay during that period. The amendment simply provides that in addition to entering judgment finding that the employer has violated the law and that the individual is entitled to reemployment, the

court may also order that he shall receive back pay for lost wages due to the violation of the law.

"That is all that the amendment does so far as this bill is concerned."

Mr. Healey:

"Mr. Chairman, this amendment merely gives the courts, after a decision has been reached in favor of the applicant for relief from failure to reinstate, power to assess as damages the loss of wages suffered by such applicant from the time he applies for reinstatement up to the time that the court finds that such reinstatement is justified on the facts and circumstances of the case. * * * the court ought to have the power to reinstate the man and assess as damages the loss of wages he has suffered from the time he applied for reinstatement."

As appears from the foregoing statements, it was well understood that without the amendment the district court would be powerless to give judgment for anything but the specific relief of reinstatement. For whenever a statute creates a new right and prescribes the remedy, that remedy is exclusive (*Pollard v. Bailey*, 20 Wall 520, 527; *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 365).

The full text of the Congressional Record of the proceedings upon this amendment on the floor of the Senate and of the House is printed in our petition for rehearing in the Court of Appeals at pages 329-334 of the Record filed in this court. To see what power the amendment was intended to give the district court it is proper to have recourse to these statements by "sponsors for the amendment" as to its intended effect (*Richbourg Motor Co. v. United States*, 281 U. S. 528, 536) especially explanations "uttered under such circumstances and with such impressive emphasis that it is not going too far to say that except for this exposition of the meaning of the section it would not have been enacted in the form in which

it was reported" (*Duplex Co. v. Deering*, 254 U. S. 443, 477). Construing another section of the very Act here involved, this court took pains to keep within "congressional policy as expressly declared by the sponsors of the words used in explaining their purpose to Congress" (*Hilton v. Sullivan*, 68 Sup. Ct. Rep. 1020, 1023, 1028).

So the question here is whether the amendment may properly be given by the courts an effect exceeding that which its sponsors said it was to have. On this, we respectfully submit:

Point I: The Act gives the district court no power to render a money judgment except for back pay incidental to the veteran's right to reinstatement.

Point II: Most of the money judgments awarded a veteran without reinstatement are within the statutory authority, as they merely allow back pay for the period in which the veteran was trying to get reinstatement.

Point III. But cases like the present one, of a money judgment for a year's damages in lieu of reinstatement, are repugnant to the statutory authority to award back pay as an incident to the right to reinstatement, and are not supported by any sound reason.

Point IV: Because of the confusion among the decisions which is continued in the new wording of the 1948 Act, a decision by this court is needed to settle a question common to both Acts.

POINT I

The Act gives no power to the District Court to render a money judgment except for back pay.

The Act empowers the court:

" * * * to specifically require such employer to comply with such provisions *and, as an incident there-*

to, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action."

Taking the words "and as an incident thereto" to mean as an incident to specifically requiring reinstatement, and paying attention to the "grammatical and substantive structure" (*Trailsmobile Co. v. Whirls*, 331 U. S. 40, 55) of this grant of power, we see that it authorizes complete relief in two parts,—reinstatement plus lost wages. The words "and as an incident thereto" make this clear. To read them, "or as an alternative thereto" is to depart from the words and scheme of the Act.

Paying attention next to the "congressional policy as expressly declared by the sponsors of the words used in explaining their purpose to Congress" (*Hilton v. Sullivan*, 68 Sup. Ct. Rep. 1020, 1023, 1025) we find that the sponsors disclaimed an intent to authorize anything except back pay as an incident to reinstatement. "That is all the amendment does", said Senator Wagner. And Representative Healey: "This amendment merely gives the courts" power to award lost wages up to date of decree for reinstatement.

The context of the Act reflects the same plan. Its aim to put the veteran back to work in his old job as soon as possible is expressed in the provision for proceeding "by motion, petition or other appropriate pleading" and for a "speedy hearing", to be "advanced on the calendar". The idle time pending such a hearing and decision was estimated by Senator Wagner at from one to three months; for this, he said he wanted back pay provided by his amendment. At the end of this idle time the veteran is fully protected by the provision that he is entitled to keep his job for one year from the date of reinstatement.

There is therefore nothing in the plan of the Act or in its wording to permit the veteran to choose damages instead of reinstatement, or to get any money recovery except on a back pay basis.

POINT II

The back-pay basis of applying the Act has been observed in most decisions, even where the judgment is for money only.

The ordinary case contemplated by the Act is that of a decree for reinstatement plus back pay up to that time.

Martin v. John S. Doane Co., 68 F. Supp. 783 (Mass.) is typical of those cases. The decree was for reinstatement plus "damages for the defendant's failure to reemploy him up to the present time." On appeal, this rule was approved, but the judgment was reversed on a question of evidence (*John S. Doane Co. v. Martin*, 164 F. 2d 537).

To the same effect are *Dacey v. Bethlehem Steel Co.*, 66 F. Supp. 161 (Mass.); *Gauweiler v. Elastic Stop Nut Corp. of America*, 69 F. Supp. 294 (N. J.); *Kay v. General Cable Corp.*, 59 F. Supp. 358 (N. J.); *Parker v. Maynard Boyce Inc.*, 74 F. Supp. 581 (Cal.); *Grone v. Congregation of Brothers of St. Xavier*, 72 F. Supp. 544, reversed on another point in 164 F. 2d 689.

There are also decisions awarding back pay without reinstatement because the question of reinstatement had been otherwise disposed of. Such cases are:

Where the plaintiff had been reinstated prior to the decree; back pay allowed up to the date of reinstatement (*Feore v. North Shore Bus Co.*, 161 F. 2d 552, 553; and *Hall v. Union Light, Heat & Power Co.*, 53 F. Supp. 817, 818).

Where, prior to the decree, an event for which the plaintiff was not responsible rendered reinstatement impossible; back pay allowed up to the date of that event (*Kent v. Todd Houston Shipbuilding Corporation*, 72 F. Supp. 506).

Where the plaintiff, at the time of the decree, elected not to take reinstatement to which he had established

a right; back pay allowed to date of decree (*Bochterle v. Albert Robbins, Inc.*, 165 F. 2d 942).

Where the plaintiff had chosen another job in preference to reinstatement; back pay allowed up to the time he made the choice (*Burkhardt v. Crucible Steel Co.*, 68 F. Supp. 802; *McAllister v. The American Transformer Co.* (N. J. Sept. 16, 1946); *Tannenbaum v. P. Ballantine & Sons* (N. J. Feb. 6, 1947; affirmed, 161 F. 2d 1023).

All these cases are strictly within the authority of the Act. The fact that at some time the right to reinstatement, though originally existing, has dropped out as an issue in the case does not deprive the plaintiff of his right to back pay for the period in which reinstatement had been an issue and he had been trying to get it. The statutory cause of action is for two things: reinstatement plus back pay, and when one part is disposed of out of court, the power of the court remains as to the remnant.

The recovery, however, is still for back pay, and the back pay is measured from the date the demand for reinstatement was refused to the date that the plaintiff ceased his pursuit of reinstatement.

POINT III

The cases which award a year's damages in lieu of reinstatement are repugnant to the statutory authority and are not supported by any sound reason.

Such cases are the case at bar (Second Circuit) and:

Third Circuit: *Heller v. Interboro Savings and Loan Association* (N. J., March 28, 1947); affirmed 166 F. 2d 83;

Ninth Circuit: *Williams v. Dodds*, 163 F. 2d 724, affirming 68 F. Supp. 995 (Arizona).

The court in these cases computed the year's "damages" from the date of refusal of the veteran's demand for reinstatement. Very little appears in the opinions as to how this is authorized by the Act, but the theory seems to be that, since the Act gives the veteran a right to reinstatement for a year, refusal of that right gives him a claim for a year's damages, if he wants it. The plaintiff's counsel at the trial of the case at bar took this approach, claiming damages "in view of the fact there was in effect a breach of contract, a breach of the provisions of the G. I. Bill of Rights, to the sum of \$24,000" (p. 17).

The trouble with this theory is that the provisions of the Act do not create any contract right, nor any right to any relief except what the Act says,—specific relief plus incidental compensation for lost wages.

This point seems to have been overlooked in all the decisions in this group. The practical results have little to recommend them, and reasons for finding the statutory power are wholly lacking.

In the Heller case, above, the court allowed damages for a year and expressed regret that since that year had expired no more damages could be allowed nor reinstatement decreed.

In the Williams case, the plaintiff, on refusal of reinstatement, sued for damages only. He remained idle for a year without trying to get other work. He was awarded as damages a year's wages less what the court estimated he might have earned had he tried. From the opinions of the District Court and of the Court of Appeals it would seem that the question of the statutory power to award damages to a veteran who prefers not to claim reinstatement and to remain idle was not considered or even raised.

In the case at bar, the plaintiff, before starting suit, had disabled himself from taking reinstatement, preferring

to go into a permanent partnership in the third month after refusal of his demand for reinstatement. In sustaining the recovery of a year's damages, the question of power is discussed in a footnote to the opinion of the Court of Appeals (p. 314). This footnote cites only cases in which the money judgment was for back pay and so measured and which, therefore, come literally within the statutory power (see above, pages 16-17).

The Court of Appeals, however, seems to treat these cases as holding that the court is free to grant such relief as will preserve the full "benefits of the statute", without looking to see what relief the statute actually authorizes. But in a statute of this character its relief provisions are part of the benefits and are exclusive of all other remedies (*Pollard v. Bailey*, 20 Wall. 520, 527).

This error of treating a statute in this way was carried further in that part of the Court of Appeals opinion which justifies awarding damages to this plaintiff because he had committed himself to a business venture which made it impossible for him to take reinstatement.

Just before he started this suit, the plaintiff signed partnership articles in a business competing with the defendants. He agreed to put in his full time; the partnership to run three years and thereafter from year to year. At the time of the trial he was still in the firm, bound until April 1949. Consequently, at no time from the beginning to the end of this suit was the plaintiff able or willing to take reinstatement.

The Court of Appeals holds that going into the partnership was in the performance of a duty to minimize damages, and that since this resulted in inability to take reinstatement, justice required that damages be awarded in lieu of reinstatement, and therefore that Congress must have intended to grant such power (p. 315).

That there was no such actual intent we know from the Congressional Record (above, pp. 12-13); and that there is nothing in the Act to express such intent is plain from the words of the Act (Point I, above).

And insofar as this reasoning assumes that the "damages" to be minimized were anything more than back pay pending the suit, it begs the question. For if the thing to be minimized was back pay incidental to reinstatement, there was certainly no "duty" to take a course inconsistent with reinstatement. Whatever "duty" the plaintiff had towards his suit for reinstatement as the main relief accorded him by the Act, was not to accept but to reject an opportunity which meant giving up that relief.

He had no duty to mitigate his recovery of back pay by an act of abandonment of his pursuit of reinstatement to which his right to back pay was incidental.

True, he had to make a choice, when offered a permanent partnership, between that and his former position. That is the same kind of choice he had the privilege of making when returning from service—demand the old job or decide to go elsewhere.

The Court of Appeals holds that under this view the benefits of the statute became merely illusory.

But there is nothing illusory in a law which says to a veteran: "If you want your old job back you can have it. If your employer refuses, the government guarantees to you (1) the help of the courts to give you an immediate hearing and a decree of reinstatement; (2) the help of the United States Attorney to procure such a decree; (3) back pay included in the decree; (4) no costs if you lose. The back pay will be reduced by anything you earn or might reasonably earn until you get your decree; but that does not mean that you have to accept an opening which prevents you from taking your old position. You may

do that or not as you like, but if you do, you are on your own, and no longer within our guaranty; it is just the same as if you had originally decided that you preferred the other job."

To speak of a "duty" to mitigate damages by getting other employment is a convenient but inaccurate way of describing the effect on the damages recoverable if such employment is refused.

"The phrase is accurate enough for most purposes, yet susceptible of misunderstanding if emphasized too sharply * * *. The servant is free to accept employment or reject it according to his uncensored pleasure. What is meant by the supposed duty is merely this, that if he unreasonably reject, he will not be heard to say that the loss of wages from then on shall be deemed the jural consequence of the earlier discharge." Cardozo, Ch. J. in *McClelland v. Climax Hosiery Mills*, 252 N. Y. 347, 359. See also American Law Institute, Restatement of the Law of Contracts, Sec. 336 d.

Since that is all that the courts really mean by a "duty to mitigate damages" the term can have no relevance whatever to a suit not for damages but for specific relief.

And certainly the courts, having created this legal fiction of a "duty" for the special purpose of reducing damages, should not divert it to the purpose of allowing damages for which the Act does not provide.

For after all, we have to go back to the Act to see what power it grants. A statute which provides for mandatory relief and incidental damages only to accompany that relief, cannot, when the right to mandatory relief fails, be stretched to authorize an award of damages instead.

LeCrone v. McAdoo, 253 U. S. 217.

POINT IV

Because of the confusion among the decisions which is continued in the new wording of the 1948 Act, a decision by this court is needed to settle the question common to both acts.

We have now two lines of decisions as to what money recovery the district courts are empowered to grant by the 1940 Act:

Recovery for the back-pay period incidental to a right to reinstatement at the end of that period is the rule for the decisions discussed in Point II;

Recovery, at the plaintiff's option, of a year's damages instead of reinstatement is permitted in the cases discussed in Point III.

These two lines of cases result from fundamentally different theories: the *first*, that the primary object of the Act is the specific relief of reemployment for a year, and that before that year begins back pay should be allowed; the *second*, that the Act contemplates reemployment for a year from the veteran's demand, and that the relief granted for refusal of that demand may be reemployment or damages for that year, or a combination of both for that year but no relief of any kind for any time after that year.

And these divergent theories bring widely divergent results for particular fact-situations. In the case at bar during most of the year for which the plaintiff has recovered damages, he was irrevocably in his partnership; his claim on the back-pay basis would have to be limited to the few preceding months in which he was still free to take reinstatement. (See *Burkhardt v. Crucible Steel Co.*, 68 F. Supp. 802.) But in most cases the year's damage theory works out to the disadvantage of the veteran. For example:

Reinstatement decreed within the year; on the theory that the back-pay period and the period of a year's reemployment are consecutive, the veteran gets reinstatement for a year from date of decree (*Parker v. Maynard Boyce Inc.*, 74 F. Supp. 581); on the other theory, reinstatement only to the end of the year from refusal of his demand (*Sullivan v. Milner Hotel Co.*, 66 F. Supp. 607).

Decree made after a year has expired from date of demand; on one theory the veteran gets reinstatement plus back pay to date of decree (*Martin v. John S. Doane Co.*, 68 F. Supp. 783); on the other theory, damages for a year only and no reinstatement (*Heller v. Inter-boro Savings and Loan Assn.*, 166 F. 2d 83 [3rd Cir.]; *Covey v. Douglas Aircraft Co.*, S. D. Cal., October 22, 1946; and see *Mihelich v. Woolworth Co.*, 69 F. Supp. 497).

The Present Confusion

Besides the actual conflicts above mentioned, the judicial opinions confess perplexity with the problem.

In *Van Doren v. Van Doren Laundry Service Inc.*, 162 F. 2d 1007 (3rd Cir.), a decree of reinstatement was made more than a year after demand had been refused. In limiting back pay to the period of that year, the court combined parts of the two theories; this, after citing the parts of the Congressional Record we have quoted above (pp. 3-4) and saying (p. 1010):

"Examination of the legislative history of the compensation provision does not leave us free from doubt as to what the lawmakers intended."

In *Kay v. General Cable Corporation*, 59 F. Supp. 358, the court, after raising a question as to the application of this same compensation provision to a case where the

veteran takes another position, hesitated to give the question a definite answer.

"This provision is not designed as a penalty upon the employer, but primarily to aid the veteran who, until he has been reinstated, is unable to re-establish himself as a wage earner in his proper field of endeavour.

"Where the veteran, notwithstanding the employer's refusal to restore him to his former position, is able to pursue his trade or profession and actually does so, it is the opinion of this court that, while the veteran may remain within the protection of the act, his situation is not of the type which the Act is primarily intended to alleviate, and compensation should be determined accordingly."

And in the case at bar, the Court of Appeals opinion cites in support of a recovery under the year's damage theory, decisions which merely allow back pay, and which the same court in *Feore v. North Shore Bus Co.*, 161 F. 2d 552, had so treated.

In an Interpretative Bulletin and Legal Guide—Veteran's Employment Rights, issued by the Department of Labor in January, 1948, some of the cases cited on Damages apply the back-pay rule and others the year's damage rule. The Bulletin, at pages 146-147 develops clearly the back-pay rule and disapproves those applications of the contrary theory which operate to the veteran's disadvantage (*Mihelich v. Woolworth Co.*, 69 F. Supp. 497 and *Covey v. Douglas Aircraft Co.*, S. D. Cal., Oct. 22, 1946 disapproved in note at bottom of page 149 of the Bulletin). On the other hand, the Bulletin's general statement, at page 125, about the power of the court to award damages seems to be quite contrary to the back-pay rule. It omits reference to the power being an incident to the right to specific relief, and broadly declares for plenary jurisdiction in the courts to award "compensatory damages,"

"independently of the jurisdiction which the acts also give them to compel an employer's compliance * * *. Compensatory damages may be awarded whether or not the veteran seeks reinstatement."

The Bulletin, therefore, leaves the matter in the same confusion between these two irreconcilable rules to which the decided cases have brought us.

The Confusion Carried Into the New Act

Section 9(d) of the Selective Service Act of 1948 gives the district courts power

"specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided*, That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions."

This differs from the provision of the 1940 Act by omitting the words "as an incident thereto" and adding the proviso that the right to reinstatement shall be in addition to the right to compensation.

The Senate Committee on Armed Services, reporting this bill, said (p. 16):

"This section is identical to the provisions of the Selective Training and Service Act of 1940, as amended, with the exception of two technical changes to bring the section more in line with judicial interpretation."

Explaining the two changes we have a letter from the committee's chief clerk, which we print at page 27 below, as an appendix.

The first change, omission of "as an incident thereto," was "to make it clear that damages can be awarded separately without regard to reinstatement." But is this any change from what the 1940 Act empowers? In cases cited in our Point II, where compensation was allowed without reinstatement, the power to award back pay without reinstatement was properly held to exist where the reinstatement question had been otherwise disposed of. The power there exercised was the statutory power to award back pay, and whether the omission of the words "and as an incident thereto" results in giving a power to award damages other than back pay, is not clear, considering that (1) the 1940 amendment as originally proposed did not contain those words, but was explained as solely a provision to authorize back pay; and (2) the proviso added to the 1948 Act treats the compensation relief and the specific relief of restoration as relating to consecutive periods, and so as providing the same comprehensive plan for full relief in this way that the 1940 Act now provides.

And if, on the other hand, the new wording of the 1948 Act was intended by Congress to give the district courts greater power to award damages than the 1940 Act gave them, then this case should be reviewed so as to give to the 1940 Act its proper limited effect as between these parties.

There is a dilemma here; a situation affecting hundreds of present and future controversies, which calls for help from this court to remove the confusion now prevailing. And a clarification of the 1940 Act by decision in this case will go far to settle a like question as to the extent of the district court's power under the 1948 Act.

It is submitted that the writ should issue.

ALLAN R. CAMPBELL,
of SCRIBNER & MILLER,
Attorneys for Petitioners.

Appendix

UNITED STATES SENATE Committee on Armed Services

11 October 1948

Mr. Herbert Plaut
Scribner and Miller
40 Wall Street
New York, New York

My dear Mr. Plaut:

This is in reply to your communication of October 5 addressed to me and also in reply to your letter of September 22, 1948, addressed to Senator Gurney. Both of your letters asked for an interpretation of certain sections of the Selective Service Act of 1948.

The phrase "as an incident thereto" was deleted from Section (d) of the Selective Service Act of 1948 before the clause "and to compensate such person for any loss." Under the earlier version of the statute, judicial decisions generally were to the effect that it was not necessary for a veteran to demand reinstatement or that reinstatement be ordered in order for him to obtain damages for violation of the statute. See, for example, *Martin v. John S. Doane Company*, 164 F. (2d) 537 (Nov. 1947); *Dodds v. Williams*, 68 F. Sup. 995 (D. Ariz. 1946); affirmed 163 F. (2d) 724 (CCA 9 1947); *Shine v. Air Associates, Inc.*, — F. Supp. — (D. N. J. 4/10/47). While there apparently has been no case holding that damages cannot be awarded separately from reinstatement, this argument has been made in some cases. The elimination of the phrase makes it clear that damages can be awarded separately without regard to reinstatement.

Appendix

The second change in this provision of the law on which you request comment is the addition of the clause "provided that any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provision." The effect of this provision is to make it clear that payment of damages does not relieve the employer of the obligation to reinstate the veteran in his former position and give him all the benefits thereof prescribed by the statute. This conclusion likewise has been reached in the vast majority of court decision. See *Martin v. John S. Doane Co.* cited above; *Gockel v. Valley Publishing Co., Inc.*, — F. Supp. — (S. D. Calif. 6/26/47); *Murphy v. Pacific Car and Foundry Co.*, — F. Supp. — (W. D. Wash. 12/21/46). A case reaching a contrary result is *Covey v. Douglas Aircraft Co., Inc.*, — F. Supp. — (S. D. Calif. 10/22/46). The additional clause eliminates any possible confusion on this point.

So far as I am aware, there is no official record of any particular judicial interpretation at which the above changes were specifically directed. The problem was brought to the attention of the Division of Veterans' Re-employment Rights and they revised the language in line with the weight of judicial authority and in conformance to what was considered to be a fair treatment of the veteran. There is no particular legislative history on the subject, since the changes were non-controversial and did not seem to represent a departure from the existing situation.

The Department of Labor, which has the responsibility of assisting veterans to obtain their reemployment rights under the Selective Service Act of 1948, has prepared a brief comparison of the 1940 and 1948 Acts. It has also prepared an Interpretative Bulletin and a collection of

Appendix

case digests summarizing what it believes to be the appropriate interpretation of the law and containing digests of all of the cases available at the beginning of this year. These are enclosed for your convenience. You may be particularly interested in referring to pages 145-149 of the Interpretative Bulletin.

Sincerely yours,

JOHN G. ADAMS
Chief Clerk

Enclosure